HUSSAINI (Migration) [2019] AATA 1520 (25 February 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr GHULAM HUSSAIN HUSSAINI
VISA APPLICANT:	Ms HESMAT HUSSAINI
CASE NUMBER:	1620756
DIBP REFERENCE(S):	OSF2012/002527
MEMBER:	Kira Raif
DATE:	25 February 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa: • Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Statement made on 25 February 2019 at 10:33am

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa –Subclass 117 (Orphan Relative) visa – visa applicant has given, or caused to be given a bogus document in relation to her visa application – applicant does not meet PIC 4020(1) – requirements of PIC 4020(1) waived – compassionate circumstances affecting the interests of Australian citizens – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, r 1.03, Schedule 2, cls 117.223

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

Application for review

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 September 2016 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).

4. The visa applicant is a national of Afghanistan, born in February 1996. She applied for the visa on 18 October 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the visa applicant did not meet Public Interest Criterion (PIC) 4020. The sponsor ('the review applicant') seeks review of the delegate's decision.

5. The review applicant appeared before the Tribunal on 25 February 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's spouse. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages. The review applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

6. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

7. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

8. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s.5(1) of the Act. In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

9. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

10. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The review applicant provided to the Tribunal a copy of the primary decision record which contains the following information.

12. The visa applicant provided with her application an Afghan national identity document (tazkera) with registration number 980253. The Department conducted a verification check on this document. On 6 June 2016 the Department received advice from the issuing authority that the visa applicant’s tazkera with the above registration number was not registered and was fraudulent.

13. The delegate wrote to the visa applicant seeking her comments on the above information. In response, the sponsor provided a statement that the visa applicant obtained the document legally through the relevant Afghan authorities in Pakistan but because they are Shia Hazaras, the authorities deny the existence of their tazkeras. The visa applicant provided a copy of her passport and copies of identity documents have also been provided to the Tribunal. However, the issue here is not the visa applicant’s identity but whether she had provided a bogus document with the application.

14. The delegate noted that the tazkera contained evidence of registration, which indicates that the tazkera was recorded in the local registration book and the page number has been recorded in the tazkera. The delegated noted that the relevant book was checked by the verification authority in the village and at the central registration directorate before it was confirmed as being non-genuine. The delegate rejected the applicant’s argument that the verification could not be confirmed because she is a Shia Hazara.

15. In his submission to the Tribunal of 31 January 2019 the review applicant states that he cannot understand why the tazkera is said to have been not registered. Since he could not provide further evidence that it was genuinely obtained, he approached the Afghan passport office in Kabul to obtain the passport which cannot be obtained without a tazkera and this shows that the tazkera was genuinely obtained. The review applicant states that the visa applicant attended the relevant office, submitted her tazkera which was checked and verified and on that basis she was issued with the passport. The review applicant submits that he document is not bogus. The Tribunal acknowledges that the visa applicant was able to obtain the passport and the review applicant’s claim, which is unsupported by evidence, that

the passport could not have been issued without the genuine tazkera. However, the review applicant has not established that the tazkera used to obtain the passport was the same tazkera that was provided with the visa application. The Tribunal does not consider that the fact that the visa applicant was issued with the passport establishes that the tazkera provided with the visa application was a genuine document. Having regard to the investigation referred to in the primary decision record, the Tribunal does not consider that it is because it was not registered with the relevant authority.

16. In oral evidence the review applicant told the Tribunal that when the application was lodged, the tazkera was genuine and there were also no problems with getting the computerised passport and they would have checked the tazkera before issuing the passport. However, it is not possible for the Tribunal to determine what steps or verifications were done when the passport was issued. It is not possible for the Tribunal to be satisfied that the tazkera was verified or that the passport was based on the same tazkera that the visa applicant produced with her application. The fact that the passport was issued does not confirm the validity of the tazkera in the Tribunal's view.

17. The Tribunal also rejects the applicant's argument that the verification could not be done because of the visa applicant's ethnicity. The Tribunal does not consider there to be any probative basis for that assertion.

18. As the tazkera was not registered with the relevant authority, the Tribunal reasonably suspects that the tazkera is a bogus document because it is counterfeit or has been altered by a person who does not have authority to do so. The Tribunal finds that there is evidence that the visa applicant has given, or caused to be given, to the Minister or an office, a bogus document in relation to her visa application. The visa applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

19. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

21. For the following reasons, the Tribunal is satisfied that the requirements should be waived.

22. With respect to the waiver, the review applicant states in his submission to the Tribunal of 31 January 2019 that there are "exceptional compelling and strong compassionate reasons" affecting the interest of the review applicant, who is a permanent resident. The review applicant states that he has been suffering from extreme anxiety, severe depression, sleep deprivation, chronic lower back and shoulder pain exacerbated by the refusal of the visa application. His condition continues to deteriorate due to the fear of uncertainty about the visa applicant's future and the security situation in Pakistan. Due to his wife's pregnancy and his own medical condition, he cannot frequently travel to Pakistan to be with the visa applicant. He is also affected by the financial situation as he needs to support the children.

23. The review applicant provided to the Tribunal evidence of the visa applicant's current activities, evidence of his travel to Pakistan and evidence of money transfers he has provided to the visa applicant. The Tribunal accepts that evidence.

24. In oral evidence the review applicant stated that his life has been destroyed. He has been disrupted from looking after his family in Australia and spends months travelling to care for his sister. The review applicant states that he travels to Pakistan frequently and spends several months there at a time. At other times, he has asked a friend to look after his sister. The review applicant states that he is responsible to care for his sister but he must also look after his family and children in Australia and his wife is pregnant with another child.

25. The review applicant also told the Tribunal that because of his travel to Pakistan he has not been unable to operate a hand car wash business. The review applicant stated that he has liability for mortgage repayments and has spent all his savings, so he needs to operate a business to survive, which he cannot do because of his travel commitments.

26. The Tribunal acknowledges Dr Bezhan's medical report which indicates that the visa applicant is suffering from worsening stress in relation to the visa applicant and outlines its effect on the review applicant's health. The review applicant told the Tribunal that he has seen a psychologist and he was told that he had to deal with the situation before his condition deteriorates.

27. The Tribunal accepts that the review applicant has family responsibilities in Australia which are affected by his concern for the visa applicant. The Tribunal accepts that the review applicant spends considerable periods in Pakistan providing support to the visa applicant and that he is concerned about her safety and well-being. The Tribunal accepts that as a result of his travel, the review applicant's family in Australia is affected as he is able to spend less time supporting his wife and children. The Tribunal also accepts there are financial implications for the review applicant and his family in Australia as a result of the review applicant's responsibilities towards his sister.

28. Having regard to the totality of these factors, the Tribunal finds that there are compassionate circumstances affecting the interests of Australian citizens. Such circumstances justify the granting of the visa. Having regard to these circumstances, the Tribunal finds that the requirements of PIC 4020(1) should be waived.

29. The Tribunal finds that the visa applicant satisfies PIC 4020 for the purposes of cl.117.223.

DECISION

30. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:

    - Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Kira Raif
Senior Member